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14  
15 **UNITED STATES DISTRICT COURT**  
16 **NORTHERN DISTRICT OF CALIFORNIA**  
17 **SAN FRANCISCO DIVISION**

18 MAXIMILIAN KLEIN, et al., on behalf of  
19 themselves and all others similarly situated,

20 Plaintiffs,

21 v.

22 META PLATFORMS, INC., a Delaware  
23 Corporation,

24 Defendant.

Case No. 3:20-cv-08570-JD

**DEFENDANT META PLATFORMS,  
INC.'S NOTICE OF MOTION AND  
MOTION TO EXCLUDE EXPERT  
TESTIMONY AND OPINIONS OF  
TILMAN KLUMPP**

Hearing Date: To Be Determined  
Time: To Be Determined  
Judge: Hon. James Donato

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**PUBLIC REDACTED VERSION****NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE that on a date to be determined by the Court, Defendant Meta Platforms, Inc. will move for an order granting Meta’s Motion to Exclude the Expert Testimony and Opinions of Advertiser Plaintiffs’ putative expert Tilman Klumpp.

Pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny, Meta respectfully requests that the Court exclude the testimony and opinions of Tilman Klumpp, contained in both his opening and rebuttal reports, in full.

**MEMORANDUM OF POINTS AND AUTHORITIES****INTRODUCTION**

Advertisers offer Dr. Tilman Klumpp to support their theory that a grab bag of unrelated conduct, including imagined agreements and internal database management, somehow contributed to the maintenance of a monopoly over “Social Advertising.” But rather than rely on his economic training to assess whether such actions (when they occurred at all) actually harmed competition, Klumpp offers a series of speculative pronouncements that have nothing to do with his supposed expertise, then pivots to inadmissible legal commentary about trade secrets he cannot describe and agreements he has never read. And nowhere in his hundreds of pages of reports does Klumpp address whether the alleged conduct actually *harmed consumers*—instead, he concedes that all of his opinions are premised on the fundamentally mistaken view that having a monopoly, standing alone, results in anticompetitive effects. That is wrong as a matter of both law and economics. Klumpp’s opinions and testimony should be excluded in full.

First, Klumpp opines that Meta did not tell the FTC about a [REDACTED] [REDACTED] that, if better publicized, would have caused the agency to order the divestiture of WhatsApp and/or Instagram. But what the FTC might have done is speculation about hypothetical agency action, not economic analysis. Second, Klumpp says that Meta improperly acquired data about how people use Snapchat, and that some aspect of that data (which aspect is never said) constituted a trade secret. Whether Meta misappropriated a trade secret requires legal and technical analysis that Klumpp did not—and is not qualified to—perform. Third, Klumpp asserts that Meta used restrictive contractual language to prevent the development of competing products, but his



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1 [REDACTED]  
2 [REDACTED]” thereby increasing competition in the alleged social advertising market and  
3 eroding Meta’s alleged monopoly. *Id.* ¶182.

4 In deposition, Klumpp repeatedly conceded that his testimony about the FTC is entirely  
5 speculative. He admits he has never worked at the FTC, has not spoken to anyone at the FTC  
6 regarding this issue, and has not reviewed any documents about how the FTC may have viewed  
7 any alleged misrepresentations. Klumpp can only guess what impact—if any—the alleged  
8 misrepresentation had on the FTC:

9 Q. Do you know if the FTC believed any of these misrepresentations?

10 A. I am not the FTC, sir. I have not worked for the FTC. I can’t opine on what they  
believed or not believe.

11 Ex. 2, Klumpp Tr. 196:17-22.

12 Q. Right. But my—I’m now asking you, there’s no way you can know, and you  
13 don’t know, whether what Mr. Parikh said had any effect on anyone at the FTC.  
Correct?

14 A. I can’t look into the FTC’s mind.

15 *Id.* at 209:10-15.

16 Q. Did anyone at the FTC ever tell you that they did not take certain actions as a  
result of the supposed misrepresentation that Facebook made?

17 A. I haven’t talked to anyone at the FTC about whether they took actions or didn’t  
take actions.

18 Q. Have you read any documents that say that the FTC did not take certain actions  
19 as a result of the supposed misrepresentation that Facebook made?

A. I don’t recall seeing documents that indicate that.

20 *Id.* at 197:7-15.

21 Because Klumpp’s opinion as to what the FTC might have done under hypothetical facts  
22 “amount[s] to mere speculation regarding [the FTC’s] future behavior,” it should be excluded as  
23 inherently inadmissible, unreliable, and speculative. *State of New York v. Deutsche Telekom AG*,  
24 419 F. Supp. 3d 783, 791 (S.D.N.Y. 2019) (holding that irrelevant or unreliable expert testimony  
25 predicting future FCC regulatory action would be excluded). Indeed, courts “routinely reject[]”  
26 the type of conjecture offered by Klumpp about what an agency likely would have done under a  
27 hypothetical set of facts because it is “unreliable and speculative.” *AIG Ret. Servs., Inc. v. Altus*  
28 *Fin. S.A.*, 2011 WL 13213589, at \*2 (C.D. Cal. Sept. 26, 2011) (citing *Twin Cities Bakery Workers*

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1 *Health & Welfare Fund v. Biovail Corp.*, 2005 WL 3675999 (D.D.C. Mar. 31, 2005) (opinions  
 2 regarding what the FDA would do under a particular set of facts were speculative, unreliable, and  
 3 inadmissible); *CFM Commc'ns, LLC v. Mitts Telecasting Co.*, 424 F. Supp. 2d 1229, 1236 (E.D.  
 4 Cal. 2005) (excluding expert opinions predicting the future actions of the FCC as speculative); *In*  
 5 *re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 545-46, 556-57 (S.D.N.Y. 2004) (concluding  
 6 that expert opinions on what the FDA might have done in hypothetical circumstances are  
 7 speculative and inadmissible).

8 Not only does Klumpp speculate as to what the FTC would have done, but his guess that  
 9 the FTC would order Meta to immediately divest Instagram and/or WhatsApp assumes the FTC  
 10 would act beyond its authority. The FTC *cannot* unilaterally compel divestiture. *See* FTC, *A Brief*  
 11 *Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking*  
 12 *Authority*, <https://www.ftc.gov/about-ftc/mission/enforcement-authority> (last visited Dec. 30,  
 13 2024) (“Divestiture orders become final after all judicial review is complete.”). And even where  
 14 the FTC seeks divestiture, resolution often takes years, as evidenced by the FTC’s lawsuit against  
 15 Meta in the District of Columbia seeking the divestiture of Instagram and/or WhatsApp, which has  
 16 been pending for over four years. *See* *FTC v. Meta Platforms, Inc.*, No. 1:20-cv-3590-JEB  
 17 (D.D.C.).

18 **B. Klumpp’s Opinion That Meta Misappropriated Trade Secrets Through The**  
 19 **Facebook Research App Is Inadmissible Legal Analysis**

20 Klumpp, a non-lawyer, next offers the baseless legal opinion that Meta misappropriated  
 21 trade secrets when collecting data about Snap through the Facebook Research App (“FBR App”).<sup>2</sup>  
 22 Klumpp employs no economic or technical analysis to reach that conclusion—he cannot even  
 23 identify what the supposed trade secrets are. Instead, he seeks to apply the U.S. Patent and  
 24 Trademark Office’s definition of “trade secret” to facts he does not know or understand, then draws  
 25 legal conclusions he is not qualified to make. Ex. 1, Klumpp Rep. ¶59. That is not admissible  
 26 expert testimony.

27 *First*, Klumpp is an economist and lacks the technical and legal expertise necessary to

28 <sup>2</sup> Advertisers refer to data collected through the FBR App as coming from Meta’s In-App Action Panel (IAAP) program. Ex. 2, Klumpp Tr. 78:19-79:9.

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1 apply the USPTO’s criteria. Klumpp’s entire analysis is confined to a single paragraph outlining  
 2 the USPTO’s three criteria for information constituting a trade secret, including whether the  
 3 information at issue (i) is generally known; (ii) can be legitimately obtained; and (iii) is subject to  
 4 reasonable efforts to maintain its secrecy, and claiming the data at issue meets them. *See* Ex. 1,  
 5 Klumpp Rep. ¶58. But Klumpp cannot, and concededly does not, make that assessment based on  
 6 any *economic* tools.

7 On the first USPTO criteria, Klumpp conceded that economic theory cannot establish  
 8 whether a particular piece of information is “generally known” to competitors (or anyone). Ex. 2,  
 9 Klumpp Tr. 129:19-130:9 (agreeing that he “didn’t offer an economic analysis in determining  
 10 whether or not the information at issue was generally known”). Klumpp admittedly applied no  
 11 economic reasoning in reaching this opinion:

12 Q. What economic analysis can you conduct to determine whether information is  
 13 generally known?

14 A. Well, I mean, that’s—that doesn’t require any—any economic theories. It’s a  
 15 fact. So the information—if the information is encrypted, it’s not general—if  
 16 the information is encrypted and somebody makes an investment—and I’m  
 using Mr. Zuckerberg’s words here, so ‘investment’ is not my word. So another  
 entity makes an investment to acquire that information, then it can’t be  
 generally known.

17 *Id.* at 128:12-22. By his own admission, the issue is one of fact and does not require application of  
 18 economic theories. *See Atmel Corp. v. Info. Storage Devices, Inc.*, 189 F.R.D. 410, 416 (N.D. Cal.  
 19 1999) (excluding industry expert’s opinion on whether information was “generally known” where  
 20 he had not “educat[ed] himself on the universe of literature in the relevant time frame ... or [on]  
 21 what others in the industry generally knew”).

22 Economic theory also does not address whether access to information can be “legitimately  
 23 obtain[ed].” That requires examination of legal rights and technical considerations like whether  
 24 information could be obtained through alternative sources, like “reverse engineering” or  
 25 “observation of the item.” *See, e.g., Allied Erecting & Dismantling Co. v. Genesis Equip. & Mfg.,*  
 26 *Inc.*, 805 F.3d 701, 704 (6th Cir. 2015). Here again, Klumpp conceded that he did no economic  
 27 analysis and instead relied only on the fact that the information was supposedly encrypted. Ex. 2,  
 28 Klumpp Tr. 130:25-132:9 (“Q. What economic analysis did you conduct to reach that opinion?

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1 A. ... Encrypted traffic means it's protected information. Snapchat—sorry, Snapchat encrypted  
 2 that traffic. So unless Mr. Zuckerberg obtains Snapchat's consent or Facebook obtained Snapchat  
 3 consent to acquire that information and decrypt it, it's not legitimately obtainable by Facebook, is  
 4 my conclusion. And with that, the second element of this definition, from an economic perspective,  
 5 I make a checkmark there.”).

6 Finally, there is no economic methodology or theory for evaluating whether “efforts to  
 7 maintain” information's “secrecy” are “reasonable,” which requires analyzing technical measures  
 8 employed by the target company to prevent disclosure. *See WeRide Corp. v. Kun Huang*, 379 F.  
 9 Supp. 3d 834, 847 (N.D. Cal. 2019), *modified in part*, 2019 WL 5722620 (N.D. Cal. Nov. 5, 2019)  
 10 (listing technical restrictions placed on disclosure of code in assessing reasonableness of efforts to  
 11 maintain secrecy). This is a fundamentally technical question outside Klumpp's claimed area of  
 12 expertise. Indeed, Klumpp described the analysis he did do here as “trivial.” Ex. 2, Klumpp Tr.  
 13 143:2-13.

14 **Second**, Klumpp's ultimate conclusion that Meta improperly obtained “trade secrets”  
 15 represents an inadmissible legal opinion. “[A]n expert cannot testify to a matter of law amounting  
 16 to a legal conclusion.” *United States v. Tamman*, 782 F.3d 543, 552 (9th Cir. 2015); *CZ Servs. v.*  
 17 *Express Scripts Holding Co.*, 2020 WL 4518978, at \*2 (N.D. Cal. Aug. 5, 2020) (Donato, J.) (“An  
 18 expert may not give opinions that are legal conclusions, or attempt to advise the jury on the law.”  
 19 (citations omitted)). Here, the term “trade secret” has a specialized legal meaning, as the source  
 20 from which Klumpp borrows his definition makes clear. Ex. 1, Klumpp Rep. ¶56 (quoting from  
 21 USPTO policy discussing federal statutory protections for trade secrets). “Because determining if  
 22 something is a trade secret is a legal conclusion, district courts in this Circuit have held that an  
 23 expert ‘may not testify that certain technology constitutes a trade secret.’” *Moement, Inc. v.*  
 24 *Groomore, Inc.*, 2024 WL 4830589, at \*3 (C.D. Cal. Oct. 29, 2024). Klumpp's assertion that the  
 25 information obtained through the FBR App “[REDACTED]” is just as impermissible. Ex. 1,  
 26 Klumpp Rep. ¶59. Referencing an “[REDACTED]” while nevertheless opining that conduct  
 27 “[REDACTED]” a legal definition, *id.* ¶58, cannot circumvent that prohibition, *Tamman*,  
 28 782 F.3d at 553 (relevant question whether testimony “amount[s] to a legal conclusion”).

**PUBLIC REDACTED VERSION****C. Klumpp's Opinion That Contract Counterparties Reduced Investment In Competing Products Based On Litigation Risk Has No Basis In Economics**

Klumpp's interpretation of Meta's API agreements has nothing to do with reliable economic analysis and relies on impermissible legal interpretations, technical opinions beyond his expertise, and speculation about how others may have interpreted and reacted to the agreements.

**First**, Klumpp cannot opine on the meaning of Meta's contracts. Klumpp says that supposedly "[REDACTED]

[REDACTED] thereby maintaining Meta's alleged social advertising monopoly. Ex. 1, Klumpp Rep. ¶167. But "[t]he interpretation of a contract is a question of law." *PixArt Imaging, Inc. v. Avago Tech. Gen. IP (Singapore) Pte. Ltd.*, 2011 WL 5417090, at \*6 (N.D. Cal. Oct. 27, 2011). "Accordingly, an expert witness should not be allowed to opine on the meaning of a contract or the rights of a party to a contract." *Id.*; *Aguilar v. Int'l Longshoremen's Union Loc. No. 10*, 966 F.2d 443, 447 (9th Cir. 1992) (same). Klumpp nevertheless seeks to offer a legal opinion about the meaning of the API agreements, asserting that they [REDACTED]

[REDACTED] Ex. 1, Klumpp Rep. ¶153. That conclusion turns on Meta's right to bring such actions, but "the rights of a party to a contract" are precisely the kind of legal determinations that must be left to the court. *PixArt*, 2011 WL 5417090, at \*6; *accord CZ Servs.*, 2020 WL 4518978, at \*4 ("[T]estimony about contract compliance would necessarily implicate a legal conclusion.").

**Second**, Klumpp claims that the [REDACTED]  
[REDACTED]  
[REDACTED]  
Ex. 1, Klumpp Rep. ¶¶163-64. Whether that is so depends on technical and legal questions about, among other things, the data being used and the parties' contractual rights and duties concerning the data at issue—not economic questions—on which Klumpp lacks the expertise to opine. Klumpp's opinion that it would be [REDACTED]

[REDACTED] is impermissible speculation and should be excluded. *See Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 861 (9th Cir. 2014) (affirming exclusion of

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1 experts whose opinions were based on “personal opinions and speculation”).

2 **Third**, Klumpp’s [REDACTED]

3 [REDACTED] is entirely speculative. Klumpp does not cite a single document or  
4 line of testimony from these counterparties. Indeed, Advertisers did not even *seek* such evidence,  
5 failing to propound a single counterparty deposition notice or document subpoena on the subject.  
6 Unsurprisingly, then, Klumpp has no evidence to support his conjecture as to what Meta’s  
7 counterparties would “likely” have done in the absence of the API agreements.

8 **D. Klumpp Cannot Reliably Opine On Agreements He Never Read, Especially**  
9 **When They Do Not Exist**

10 Klumpp’s two remaining opinions address the purported effects of contracts he has never  
11 reviewed. Klumpp’s opinions on their effects are therefore irrelevant and unreliable. This is  
12 especially true for the Netflix “agreement,” which he does not know even exists (it does not).

13 **First**, Klumpp purports to assess the effects of an alleged unwritten agreement with Netflix.  
14 Even setting aside that interpreting a contract involves legal questions not suitable for expert  
15 testimony, *supra* pp.7-8, Klumpp never reviewed the alleged agreement in forming his opinions  
16 because Advertisers have no evidence that such an agreement existed. Klumpp admits this, stating:  
17 “I am not offering an opinion as to whether such an agreement existed. I will, however, analyze  
18 the anticompetitive effects of the alleged agreement, assuming it can be shown that the alleged  
19 agreement existed.” Ex. 1, Klumpp Rep. ¶125. But Klumpp cannot reliably analyze whether the  
20 made-up agreement includes terms that give rise to an anticompetitive effect because he cannot  
21 review or analyze the purported terms. *See Maldonado v. Apple, Inc.*, 2021 WL 1947512, at \*20  
22 (N.D. Cal. May 14, 2021) (excluding testimony when “[t]he flaw in [the expert]’s opinion is  
23 precisely that the underlying material was *not* communicated to him and he did *not* review it”).

24 The Court should not permit Advertisers to introduce—with the imprimatur of expert  
25 testimony—opinions that a hypothetical agreement with hypothetical terms that Klumpp never  
26 reviewed somehow allowed Meta to maintain its purported monopoly. This is especially true  
27 because Klumpp conceded that there were economically rational reasons for Meta reducing its  
28 “premium video streaming” budget in the absence of an agreement—as he testified, “I have no

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basis to believe that [Meta’s budget cut] was not a rational decision.” Ex. 2, Klumpp Tr. 288:21-289:11; *see Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir. 1997) (affirming exclusion of expert’s opinions as “speculative,” in part because of “his inability to dismiss various other possible causes” of the alleged harm).

**Second**, Klumpp’s opinions on the Network Bidding Agreement (“NBA”) should be excluded. Klumpp says that Meta received favorable terms on bidding for ad impressions through Google’s Open Bidding platform to the disadvantage of current or prospective competitors. Ex. 1, Klumpp Rep. ¶¶98-101. According to Klumpp, Google’s guarantee to match a Meta user to a certain percentage of bid requests sent to Meta was the “most critical provision” and the “key part of why [he] conclude[s] the agreement was anticompetitive.” Ex. 2, Klumpp Tr. 211:3-212:17. But Klumpp acknowledges (as he must) that it is necessary to review each company’s terms to assess which are more favorable. *Id.* at 223:16-224:19 (“Q. [I]f I want to assess whether firm F has a better contract with firm G than firm T, I need to know the terms that both firm F and firm T have with firm G. Correct? A. Yes, but, look, I did not—I mean, I—this—what you said may be correct but it’s not the opinion that I stated.”). And Klumpp admitted in his deposition that he had not reviewed a *single* agreement between Google and any of Meta’s purported competitors. *See id.* at 230:18-23.

Seeking to avoid these fatal defects, Klumpp pivoted to asserting that he never opined that Meta had the most favorable terms, just that he had not seen evidence that other firms received the same terms. *Id.* at 227:1-14 (“Q. So given that you only saw Facebook’s agreement for open bidding with Google, it’s hardly surprising that you think those are the best terms that anyone got. Correct? A. No, that’s a—I—first of all, I didn’t say those were the best terms anyone got. That’s not my conclusion. My conclusion is I haven’t seen evidence that other firms received these same terms ...”). That has the burden of proof exactly backwards. And saying “I haven’t seen evidence” when you have not looked for it is junk science. But in all events, what is clear from Klumpp’s testimony is that he had not reviewed Meta’s purported competitors’ terms, and so he could not possibly have seen evidence that other firms received the same terms as Meta (or better or worse ones). Klumpp’s failure to do so renders his opinion that Meta’s terms with Google were more

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1 favorable than—or even different from—its competitors unreliable.

2 **II. KLUMPP’S OPINIONS SHOULD BE EXCLUDED BECAUSE HE ERRONEOUSLY CONFLATES**  
 3 **MONOPOLY MAINTENANCE WITH ANTICOMPETITIVE EFFECT**

4 Underlying all of Klumpp’s opinions is the assertion that the maintenance of monopoly  
 5 power on its own constitutes an anticompetitive effect. Proof of an anticompetitive effect,  
 6 however, requires evidence of actual detrimental effects on competition, “such as reduced output,  
 7 increased prices, or decreased quality in the relevant market.” *Epic Games, Inc. v. Apple, Inc.*, 67  
 8 F.4th 946, 983-84 (9th Cir. 2023) (quoting *PLS.Com, LLC v. Nat’l Ass’n of Realtors*, 32 F.4th 824,  
 9 834 (9th Cir. 2022)). The supposed continuation of Meta’s alleged monopoly power because of  
 10 the challenged conduct is not, by itself, an anticompetitive effect: “[T]he possession of monopoly  
 11 power will not be found unlawful unless it is accompanied by an element of anticompetitive  
 12 conduct.” See *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407  
 13 (2004).

14 Klumpp offers no opinion that Meta’s conduct caused or threatened to cause any  
 15 cognizable anticompetitive effect like “reduced output, increased prices, or decreased quality in  
 16 the relevant market.” *Epic Games*, 67 F.4th at 983-84. Instead, he repeatedly testified that he was  
 17 *not* opining about any of the kinds of effects that could be anticompetitive as a matter of law:

18 Q. I’m just trying to exhaust—make sure for the rest of the day I have an  
 19 understanding of what you’re saying is the anticompetitive effect ... [T]ell me  
 20 if I’m wrong, but what you’re saying is the challenged conduct allowed  
 21 Facebook to maintain a monopoly in social advertising and that was the  
 22 anticompetitive effect.

23 A. That is a fair overall characterization of what my opinions are.

24 Q. And there’s not a different anticompetitive effect, not looking for different  
 25 words, but there’s not a different anticompetitive effect from the challenged  
 26 conduct that you’re saying occurred in social advertisement.

27 A. No, I would—I would characterize my opinions as overall supporting a finding  
 28 of monopoly maintenance.

Ex. 2, Klumpp Tr. 45:4-21.

In other words, he failed to show that the challenged conduct harmed advertisers—and did  
 not even try to do so. That makes his opinions both wrong and useless to the jury. See *Williamson*  
*Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1323 (11th Cir. 2003) (affirming exclusion of

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1 plaintiff's expert opinion as irrelevant where expert failed to offer testimony as to the proper legal  
2 standards); *United States v. Apple, Inc.*, No. 1:12-cv-02826, Dkts. 262, 265 at 32:9-35:24  
3 (S.D.N.Y.) (excluding as irrelevant expert's testimony that depended on a "faulty legal  
4 assumption" about the governing standard).

**CONCLUSION**

6 The Court should exclude Klumpp's testimony in full.

8 Dated: December 30, 2024

Respectfully submitted,

9 By: /s/ Sonal N. Mehta

10 SONAL N. MEHTA

11 *Attorney for Defendant Meta Platforms, Inc.*

**CERTIFICATE OF SERVICE**

13 I hereby certify that on this 30th day of December, 2024, I electronically transmitted the  
14 public redacted version of the foregoing document to the Clerk's Office using the CM/ECF System  
15 and caused the version of the foregoing document filed under seal to be transmitted to counsel of  
16 record by email.  
17

18 By: /s/ Sonal N. Mehta

19 Sonal N. Mehta  
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